IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.870/2003

Reserved on: 23.10.2007

Decided on. 29.10.2007

Shamsher Singh. . …Petitioner.

Versus

Union of India and others. Respondents

Coram

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting ?[1]*. No.*

For the petitioner : Ms. Ranjana Parmar, Advocate.

For the respondents Mr. Sandeep Sharma, Assistant Solicitor General of India for respondents No. 1 to 3.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was enrolled as Sepoy in the Dogra Regiment on 14.7.1979. He was promoted as acting Niak on 1st April, 1991 and substantially promoted as Naik on 1.10.1993. He was promoted as acting Havaldar in the year 1998 and was substantially promoted as Havaldar on 22.12.1999. The post of Havaldar is in the feeder category for promotion to the post of Naib Subedar. The criteria for effecting the promotion from the post of Havaldar to the post of Naib Subedar reads thus:

(i) **"Only last five years reports will be considered, out of which minimum three reports must be in the rank of Havaldar and in case of shortfall rest may be in the rank of Naik.**

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No.

(ii) At least three out of last five reports should be 'above average' with a minimum of two in the rank of Havaldar and remaining should be not less than 'High Average'.

(iii) The individual must have a minimum of two reports on Regimental Duty or as an Instructor in an Army School of Instructions, including Indian Military Academy, National Defence Academy, Officers Training Academy and Army Cadet Corps, out of which at least one should be Above Average. One of the Regimental Reports should have been earned in the rank of Havaldar.

(iv) The individual should have been recommended for promotion in all the five reports."

The procedure for recording of initiation/review of confidential reports for Junior Commissioned Officers/Non-Commissioned Officer reads thus:

> **"Initiating Officer: - Immediate superior officer as on due date of initiation provided the candidate had served for a minimum of 90 days physical service under the Initiating Officer during the reporting year."**

The case of the petitioner for promotion to the post of Naib Subedar from Havaldar is now to be considered in view of the criteria reproduced hereinabove.

Ms. Ranjana Parmar, Advocate had strenuously argued that the petitioner was fully eligible and qualified to be considered for promotion from the post of Havaldar to the post of Naib Subedar, more particularly, when he had already qualified the promotion cadre test on 14th February, 2002 and as far as regimental ACRs are concerned, her client cannot be faulted with since the Initiating Officer had not initiated the process as per the norms mentioned in the reply.

Mr. Sandeep Sharma, Assistant Solicitor General of India had strenuously argued that since the petitioner was not in possession of regimental ACRs, his case could not be considered for promotion.

I have heard the learned counsel for the parties and perused the record.

The petitioner was promoted as Havaldar on acting basis in the year 1998. He was promoted substantially to the post of Havaldar on 22.12.1999. He was posted in Headquarters Eastern Command, Calcutta with effect from 2nd May, 1999 to 30th June, 2002. He reported in his unit on 12th August, 2002. He served under the Initiating Officer with effect from 12th August, 2002 to 4th September, 2002. The Initiating Officer proceeded on leave from 5th September, 2002 to 15th September, 2002. He again served under the Initiating Officer from 16th September, 2002 to 12th October, 2002. Thereafter the Initiating Officer proceeded back to the Dogra Regiment Centre, Faizabad on termination of attachment with 5 Dogra. It is in these circumstances that petitioner could not complete 90 days physical service under the Initiating Officer. The respondents as is evident from the reply were aware of this injustice being meted out to the petitioner that is why the case of the petitioner was taken up by the respondent No.2 with the respondent No.3.

Now, the Court has to consider whether the petitioner could be deprived of the promotion on the basis of inaction on the part of the Initiating Officer to initiate the writing of the ACRs? The answer is no. The petitioner in no manner was responsible for non-writing of the ACRs by the Initiating Officer. The Initiating Officer himself was not available on two occasions and thereafter he had gone back to his Dogra Regimental Unit, Faizabad. Had the Initiating Officer initiated the process of writing of the ACRs, the same would have been available at the time of

consideration of the petitioner for promotion to the post of Naib Subedar. It is further evident from the Annexure P-4 that respondent No.2 had sent the information to respondent No.3 that the ACRs for the year 2002 be made available for considering the case of the petitioner for promotion to the post of Naib Subedar from the post of Havaldar. It is evident from the norms prescribed for filling up the post of Naib Subedar from the post of Havaldar that only last five years reports are to be considered, out of which minimum three reports must be in the rank of Havaldar and in case of shortfall rest may be in the rank of Naik. It is further stated therein that at least three out of last five reports should be above average with a minimum of two in the rank of Havaldar and remaining should be not less than high average and the individual must have a minimum of two reports on regimental duty, out of which at least one should be above average and one of the regimental reports should have been earned in the rank of Havaldar. Thus, what was required as per the norms prescribed was that one regimental report should have been earned in the rank of Havaldar.

The petitioner was posted at Headquarters Eastern Command on 2nd May, 1999 where he remained upto 30th June, 2002. The Annual Confidential Reports of the petitioner could be initiated in the year 1999 and also when he came back and joined his active duties in his unit with effect from 12th August, 2002. Since the Initiating Officer had not initiated the reports either in 1999 or in 2002, the petitioner cannot be blamed for the same. It was for the authorities concerned to ensure that once the petitioner was available in the year 1999 in the regiment and thereafter in the year 2002, the Annual Confidential Reports should have been initiated by the Initiating Officer. The petitioner was promoted as acting Havaldar on 1st November, 1998 and he was substantially promoted as Havaldar on 22nd December, 1999. In view of the peculiar facts and circumstances of

the petitioner's one Annual Confidential Report in regiment was available while he was working as Naik with effect from 1st April, 1991 onwards and the second regimental report was not prepared for the simple reason that the Initiating Officer was not available.

Ms. Ranjana Parmar, Advocate had also drawn the attention of the Court to the criteria to promotion for Junior Commissioned Officer/Non-Commissioned Officer dated 10th October, 1997, more particularly, paras 12 and 13, which read thus:

> **"12. Relaxation in ACR Criteria. No relaxation in quality of ACR criteria is permissible. However, in exceptional circumstances such as where an ACR(s) is/are set aside/ dispensed with, request for relaxation of only one ACR out of the mandatory number of ACRs may be projected to Army HQ (AG/PS 2(c)). Such requests should be routed through departmental channels duly vetted by OIC Records.**
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> **13. Age criteria promotion to the rank of Nb. Sub. Age criteria for promotion to the rank of Nb. Sub has been laid down vide Para 149 (c) of Defence Service Regulations (Army) Revised Edition 1987. Relaxation in age criteria is normally not permissible. Exceptional cases for relaxation of age criteria, may, however be projected to Army HQ (AG/PS 2 (c)) through staff channel duly vetted by OIC Records as per the procedures laid down vide Army HQ letter No.92209/AG/PS 2(c) dated 08/14, Sep. 62."**

It is thus evident from the combined reading of paras 12 and 13 of the criteria for promotion to Junior Commissioned Officer/Non-Commissioned Officer notified on 10th October, 1997 that there can be relaxation of one ACR out of the mandatory ACRs though the same is

required to be projected to Army Headquarters and such request is routed through departmental channels duly vetted by OIC Records. Similarly there can be relaxation in age criteria in exceptional cases.

The upshot of the above discussion is that:

(i) the petitioner was bound to be considered for promotion to the post of Naib Subedar from the date persons junior to him have been promoted;

(ii) it was incumbent upon the Initiating Officer to initiate the process for writing Annual Confidential Reports in the year 1999 as well as in the year 2002 when the petitioner had joined back on 12th August, 2002 in his unit. The petitioner cannot be penalized for inaction on the part of the respondents, who were remiss in initiating the process of writing the Annual Confidential Reports;

(iii) the petitioner had already earned more than one regimental report while working as Naik in the regiment and as far as second regimental ACR is concerned, the same could not be insisted for considering the case of the petitioner for promotion in view of the above discussion or alternatively the respondents were bound to seek the relaxation of one ACR out of the mandatory number of ACRs as per para 12 of the criteria for promotion for Junior Commissioned Officer/Non-Commissioned Officer notified on 10th October, 1997. Similarly, if the petitioner was becoming over-age, the relaxation was required to be sought as per para 13.

Accordingly the writ petition is allowed. The respondents are directed to consider the case of the petitioner for promotion to the post of Naib Subedar even though he stands superannuated on 31st July, 2003 and if found suitable to grant him all the benefits i.e. arrears of salary etc.

to him from the date when his juniors were promoted in view of the judgment of the Hon'ble Supreme Court in case ***State of Kerala and others Versus E.K. Bhaskaran Pillai***, (2007) 6 SCC 524. There shall be no order as to costs.

(Rajiv Sharma), Judge

October 29, 2007
Awasthi